Office-Supreme Court, U.S.
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NOV 15 1965
JOHN F. DAVIS, CLERK

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 518

JOHN J. OLING, DAVID J. LANDRY, on behalf of themselves and all other "second officers" in the employ of United Air Lines, Inc., similarly situated, *Petitioners*

v.

AIR LINE PILOTS ASSOCIATION, and UNITED AIR LINES INC., *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

I. J. GROMFINE
HERMAN STERNSTEIN
WILLIAM B. PEER
1155 15th Street, N. W.
Washington, D. C.
Attorneys for Petitioners

Of Counsel:

ZIMRING, GROMFINE AND STERNSTEIN
1155 15th Street, N. W.
Washington, D. C.

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REPLY BRIEF FOR PETITIONERS

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1. A major portion of the briefs of both Respondents is devoted to an effort at justifying the April 24, 1964 Order of the CAB on its merits. In addition to the fact that in so doing Respondents have chosen to ignore the rule that, in an appeal from the granting of a motion

to dismiss for lack of jurisdiction material factual allegations of the complaint must be taken as admitted, the merits of the CAB order are in no way germain to anything raised by this Petition. A substantive reply to what Respondents have said on that matter would, therefore, be equally irrelevant and will not be made.

2. The emphasis placed by Respondents on the substantive matters that were before the CAB is part and parcel of the process by which Respondents have sought to make it appear as though this case involved a routine application of the rule prohibiting collateral attacks on administrative determinations. What makes this case so appropriate for the granting of certiorari is that Respondents succeeded so well with this confusion in the court below that there emerged from that court a decision which does not merely misapply the collateral attack rule; it develops a new rule wholly at war with what this Court has said is the law on the relationship between administrative and judicial proceedings in circumstances such as are present here.

Critical to the argument of Respondents—and to the decision below—is the assumption that the matters raised by the complaint in the District Court arose out of, and are inseparable from, the matters that were before the CAB in the United-Capital merger proceedings. The record before this Court makes it clear that this is just not true. The chain of events which lead to the complaint in the District Court had been initiated long before the merger, and they would have produced the same Railway Labor Act violations that Petitioners are seeking to remedy in this suit whether or not there had ever been a merger.

At the heart of what Petitioners are complaining of in this lawsuit is the discriminatory treatment by ALPA, their certified bargaining representative, the attempts by ALPA to coerce Petitioners in their choice of a bargaining representative, and the delegation by United to ALPA of complete control over seniority, thereby enabling ALPA to punish Petitioners for their known opposition to ALPA. These matters arose out of a struggle between ALPA and FEIA for the right to represent the flight engineers in the employ of United. That struggle began long before the merger of United and Capital was even contemplated, and it involved much more than the matter of seniority. (P.A. 121-123) What placed ALPA in the position to penalize Petitioners by discriminating against them was not the merger of United and Capital, but rather the 1961 representation proceeding, as a result of which ALPA was able to oust FEIA as the bargaining representative for flight engineers. And that representation proceeding was wholly unrelated to the merger or to the CAB proceeding involving the merger. (P.A. 122-123)

The merger was a purely fortuitous intervening circumstance which in no way changed the basic problem of whether ALPA, which had emerged (not from the merger but from the 1961 representation proceeding) as the bargaining representative for the single unit of pilots and flight engineers, was going to accord equal treatment to the flight engineers as the Railway Labor Act requires, or was going to penalize those—including Petitioners—who for years had been openly in opposition to ALPA, its policies, and its efforts to take over the bargaining rights from FEIA.

The central theme in the instant lawsuit, based upon the Railway Labor Act, is expressed in paragraph 23 of the Complaint, which states that:

> "23. The unlawful acts were motivated by defendants' desire to discriminate against plaintiffs because of their known defense of the program and policies of Flight Engineers' International Association, their known opposition to the program and policies of ALPA, and their refusal to become members of ALPA" (P.A. 8)

That allegation, as are others in a similar vein, rests upon facts that are wholly independent of the merger of United and Capital.

In the merger proceedings before the CAB so far as is relevant here, only the question of seniority was involved, and, even as to this, the CAB was concerned only with the question whether the merged seniority was "fair and equitable". This was *not* a proceeding under Section 401 (k)(4) of the Federal Aviation Act (see footnote 4 at p. 13 of the Petition); and the CAB had no jurisdiction to determine whether in negotiating the seniority issue ALPA and United had acted in accord with the Railway Labor Act,[1] or to issue any appropriate relief if it were to find that the Railway

[1] The fact that before the CAB Petitioners urged that among the reasons why the seniority merger was not "fair and equitable" was the fact that ALPA and United had acted from discriminatory motives, and had otherwise conducted their negotiations in violation of the Railway Labor Act could not serve to invest the CAB with jurisdiction to enforce the Railway Labor Act, any more than the rejection of these contentions by the CAB can be construed as a determination by the CAB of rights under the Railway Labor Act. Suppose Petitioners had claimed that the seniority merger was not "fair and equitable" because it reflected racial discrimination. Could it be argued that the CAB was thereby invested with jurisdiction to enforce the Civil Rights Acts?

Labor Act had been violated.[2] Only the CAB, acting in a Section 401(k)(4) proceeding, not here involved, or the Federal Court in suit such as the instant one has any such jurisdiction.

In the light of the foregoing, the effort to twist this case into the conventional mold of "collateral attack" must surely fail. In the precedents cited at p. 11 of

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[2] United argues (at pp. 18-19 of its Brief) that the CAB did have authority in the merger proceeding to issue an order against ALPA by referring to *Kent* v. *CAB*, 204 F. 2d 263, 266 (CA2), where the Court sanctioned the right of the Board to issue an order forbidding the *carrier* from entering into a discriminatory agreement with a union. Apart from anything else, this argument totally ignores the fact that the instant complaint seeks relief against ALPA far broader than the banning of discriminatory agreements.

Even more surprising is the reliance by United (at p. 19 of its Brief) on *Chorbajian* v. *CAB*, 229 F. 2d 81 (CA2), for the proposition that the CAB had jurisdiction in the merger proceedings to award the damages Petitioners seek if it had found merit to their complaint. In that case the Court did no more than approve the *refusal* of the CAB to interpret its order concerning seniority as having provided for any monetary compensation to the employees involved.

Nor is there any merit to the contention stated at p. 19 of United's Brief that "a suit for damages may only be entertained by the courts after the Board has already found that a violation of the statute has been committed." In a situation directly comparable to what is presented here (i.e. suits under Section 303 of The Labor-Management Relations Act, as described at p. 21 of the Petition) this Court has made it perfectly clear that where Congress has made certain conduct subject to both "administrative and conventional legal sanctions", the remedies are independent of each other; the Court does *not* require a "substantive symmetry" between the administrative and judicial approaches; and damages may not be denied on the ground that the administrative agency has not found the conduct unlawful. *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 243-244; *NLRB* v. *Radio Engineers et al.*, 364 U.S. 573, 585.

United's Brief, and at p. 11 of ALPA's Brief, the suits found to be barred by the rule against collateral attack involved a matter which arose directly out of the issues that were before the administrative agency, and had no real independent existence. What is more, in all of the cases relied upon the lawsuit was a direct attack upon an affirmative order issued, or similar action taken by the administrative agency; and if the court were to grant the relief sought in the lawsuit the heart and substance of the action taken by the administrative agency would have been negated. That is a far cry from the instant case. The CAB has issued no order of any kind directed at the Railway Labor Act violations here involved; and nothing sought by Petitioners would affect in any way approval of the merger between United and Capital which was the heart and substance of that proceeding.

An examination of the District Court decision in *Holman* v. *Southern Airways Inc.*, 210 F. Supp. 407 (N.D. Ga.), on which Respondents as well as the court below place very heavy reliance, points up the essential distinction. In that case, the CAB, *acting not in a merger proceeding but rather under the aforementioned Section 401(k)(4) of the Federal Aviation Act,* found that Southern had violated the Railway Labor Act by discriminating against certain striking pilots. The CAB had issued an order specifically directing Southern to reinstate the strikers, and to grant them seniority ahead of the pilots who had been hired during the strike to replace them. The lawsuit in *Holman* was instituted by those replacements asking that Southern and ALPA be enjoined from putting into effect the remedial order issued by the CAB on the specific ground, as the Court put it, that ". . . the orders of

the Civil Aeronautics Board were made without their being given their day in court . . .", and on the ground that ". . . the orders of the Civil Aeronautics Board, which they are challenging herein, and the agreements made pursuant thereto are contrary to contractual employment undertakings by defendant Southern Airways Inc., with the respective individual plaintiffs."

Whether or not the Court reached the proper conclusion in *Holman,* it is at least understandable that the Court should there conclude that the suit was one involving an attempt to obtain review of the CAB order with respect to Railway Labor Act violations. In the instant case, however, no proceeding was instituted under that section of the Federal Aviation Act giving the CAB jurisdiction with respect to Railway Labor Act violations, and no order has been issued by the CAB which would be negated by the relief Petitioners seek herein.

3. The heavy reliance by Respondents, as well as the court below, on *Whitney National Bank* v. *Bank of New Orleans & Trust Co. et al.,* 379 U.S. 411, is particularly significant and revealing. As noted in the Petition (pp. 19-20) critical to the decision of this Court in *Whitney* was the finding that the jurisdiction of the Federal Reserve Board over the matter which was the subject of that lawsuit against the Comptroller of the Currency is *"original and exclusive."* The decision does not say that before one may attack the Comptroller of the Currency on the issue of the holding company operation one must *first* appeal from the decision of the Federal Reserve Board on that issue. It says that where, as in that case, the object of the attack is the issue of the holding company operation, the *only* agency with any jurisdiction

in the matter is the Federal Reserve Board, and the *only* remedy against a decision by the Federal Reserve Board on that issue is an appeal from that decision, and not a suit against the Comptroller.

Thus, the decision below extends *Whitney* far beyond what was plainly intended by This Court, *unless* it be also accepted as a valid proposition that the jurisdiction of the CAB in the matters covered by the instant complaint was, as in *Whitney,* "original and exclusive".

And, while repeatedly protesting that the court below did not rule that the CAB had exclusive jurisdiction in the matter, Respondents cannot resist suggesting (e.g. United Brief p. 21) that the decision below should be sustained on the theory that under the Federal Aviation Act approval by the CAB of the seniority arrangements negotiated between United and ALPA immunized those arrangements from any claim of Railway Labor Act violation, which is really just another way of stating the claim of exclusive CAB jurisdiction.

But neither the claim of exclusive CAB jurisdiction of the matters covered by the instant complaint, nor the related immunity argument, can be sustained—indeed, as pointed out in the Petition (Footnote 4 pp. 12-14), such contentions have been disavowed by the CAB itself.

It should also be noted that to the extent that the decision below must be rationalized by the suggestion that the CAB order in the merger proceeding immunized the transaction against any claim of Railway Labor Act violation, it is squarely in conflict with the decision in *Trans World Airlines* v. *Hughes,* 332 F. 2d

602 (CA2), (cert. granted 33 U.S. Law Week 3182; but later dismissed as having been improvidently granted 33 U.S. Law Week 3295), thereby adding an additional justification for the granting of the instant Petition. The Second Circuit, in *Trans World* had before it a case in which the CAB, acting under Section 408 of the Federal Aviation Act had approved certain financing arrangements proposed by the controlling stockholders of TWA, which, among other things, had the effect of limiting TWA in the sources from which it could lease or purchase equipment. TWA thereafter brought suit in a federal district court claiming that those arrangements violated the Sherman and Clayton antitrust acts. The suit was defended on the ground that approval by the CAB had immunized the transactions against suits based on the antitrust laws. The district court rejected that defense, and the Second Circuit agreed, in the following language that is directly applicable here, and is diametrically opposed to the result reached by the court below in the instant case:

> *"Nowhere in the Act is the Board specifically charged with the duty of monitoring each transaction which is ultimately effected between the carrier and its controller once an acquisition is approved. The Board concededly may condition its approval of a control acquisition upon such terms as it may find to be just and reasonable and thereby retain a continuing jurisdiction over the activities of the controlling party.* In the exercise of this supplementary power the Board *may investigate and regulate certain aspects of transactions effected between an air carrier and the controlling party. But the existence of this power—which was employed in approving Toolco's acquisition of control over TWA—hardly supports the defendants' claim that Congress placed the regu-*

> ***lation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB.*** The issue here is not whether the CAB may consider such matters but rather whether the federal courts have been excluded from their consideration by Congress. There is virtually no limit to the nature and variety of the transactions which fall within this category. ***In the absence of an explicit congressional mandate entrusting such transactions exclusively to the Board we can find no basis for declaring the federal courts to be without jurisdiction in such matters."*** (332 F. 2d 602, at 608-609, Emphasis added)[3]

4. In truth, as set forth in the Petition, the decision below cannot be read except as enunciating a new rule—contrary to everything thus far established by this Court—that even where there is concurrent administrative and judicial jurisdiction,[4] the prosecution of the administrative remedy to the point of an adverse decision, precludes resort to the judicial remedy.

Striving to avoid that inescapable conclusion, United injects a new, and even more surprising propo-

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[3] United, at p. 21 of its Brief, cites *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F. 2d 424 (CA8) for the proposition that the ICC has jurisdiction to prescribe seniority arrangements even though such arrangements may conflict with procedures prescribed by the Railway Labor Act. The suit in that case was not based on the Railway Labor Act but was to enforce the arrangements which had been specified by the ICC and *agreed to* by the very parties to the litigation. Significantly, the Court specifically *rejected* the contention that the action of the ICC had ousted the Federal Courts of jurisdiction (314 F. 2d at 428).

[4] In the context of the instant case, the statement by the court below that "we do not reach" the issue of whether the CAB had exclusive or concurrent jurisdiction plainly means only that it makes no difference how that issue may be determined, i.e. that the election of remedies is binding whether it be true that the CAB's jurisdiction is exclusive or concurrent.

sition (United Brief pp. 19-20). We are told, in substance, that what the decision below really stands for is the rule that where, as here, a complainant with rights justiciable both before an administrative and a judicial forum proceeds first before the administrative agency in order to avoid the claim of failure to exhaust administrative remedies, he must appeal from an adverse administrative determination before he may resort to the judicial remedy.

But such is surely not the law, and none of the cases cited by United stands for any such proposition. Two illustrations from the cases cited at p. 20 of United's Brief should suffice to make this clear. In *Pennsylvania Railroad Co.* v. *United States,* 363 U.S. 202, this Court held only that the complainant was *entitled* to obtain a review of an adverse decision from the ICC, and that the Court of Claims should have acceded to the request of that complainant to stay the proceedings in a related proceeding until the review in a District Court had been obtained. There is not the remotest suggestion that if the complainant had elected not to avail itself of the review the Court of Claims would be without jurisdiction to proceed.

In *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, the complainant filed suit in the court *while the proceeding before the administrative agency was still pending and not yet determined.* This Court held no more than that the doctrine of exhaustion of administrative remedies requires "awaiting their final outcome before seeking judicial intervention".

In the instant case, Petitioners awaited the final outcome of the administrative proceedings before instituting judicial proceedings. The CAB having no authority effectively to remedy the Railway Labor Act

violations involved, it was only an abundance of caution that dictated proceeding initially before the CAB in the merger proceeding. Had Petitioners appealed and prevailed, they could not have obtained the measure of relief that is available to them in a proceeding before a Federal Court under the Railway Labor Act, and this suit would have to have been ultimately filed in any event. But they are now told that having elected to proceed first before the CAB in an effort to obtain whatever limited measure of relief might there be available, having been denied that relief, and not having appealed that denial they have lost their judicial remedy—and this even if it be assumed that the courts share concurrent jurisdiction with the CAB on the matters covered by the complaint.

If that is the way in which the Federal Aviation Act, (and, since the issues are the same, the Interstate Commerce Act) is to be read, this Court should say so. Unless the matter is clarified by this Court, the decision below, when read in the light of all other applicable precedents, leaves the thousands of employees who are affected by airline and railroad mergers and consolidations in hopeless confusion.

Respectfully submitted,

I. J. Gromfine
Herman Sternstein
William B. Peer
1155 15th Street, N. W.
Washington, D. C.
Attorneys for Petitioners

Of Counsel:

Zimring, Gromfine and Sternstein
1155 15th Street, N. W.
Washington, D. C.